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Copyright Protection for Audiovisual Works in the European Community

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Introduction

The demand for audiovisual works in the European Community (EC)[1] is increasing dramatically as a result of the privatization of television channels and the subsequent emphasis on competitiveness. Consequently, the EC's media-related laws, most notably in the area of copyright, are constantly changing to adapt to the new market conditions. At the same time, the increased demand for audiovisual works has fueled international piracy of copyrighted materials. Thus, firms that produce or distribute audiovisual works in the EC are finding it vitally important to understand the scope of copyright protection afforded in the Community and at the national level.

An audiovisual product may be reproduced and performed or exhibited in several ways. For example, a made-for-television movie may be exhibited on either a network or independent television station. A movie initially exhibited in a movie theater may also be exhibited on television. A television program broadcast on a network may later be syndicated and broadcast on other stations, on cable, or via satellite. Movies originally exhibited in theaters or on television may be transferred to videocassette and sold or rented. The product may also be exhibited in some or all of the EC Member States (currently with different copyright laws), the United States, and other international markets.

Thus, two issues must be addressed with respect to how audiovisual programs should be reproduced and performed: (1) the level of protection that may be expected in the EC and (2) the limits of that protection. Part I of this article explores the scope of copyright protection of audiovisual works in view of both the particular copyright laws of the EC Member States as well as current efforts to harmonize various aspects of those laws. Part II discusses the limitations of copyright protection as embodied in the Community "exhaustion" doctrine, which arises when audiovisual works are distributed across national borders, and the impact harmonization will have on the exhaustion doctrine.

I
Scope of Copyright Protection for Audiovisual Works in the European Community

A. Copyright Protection for Audiovisual Works Under National Legislation

Generally, civil law countries, which in the EC include all the Member States except the United Kingdom and Ireland, protect the rights of

1. The EC is currently comprised of 12 Member States: France, the United Kingdom, Ireland, Germany, Belgium, Denmark, the Netherlands, Luxembourg, Italy, Spain, Portugal, and Greece.

an author rather than the author's employer. These countries do not recognize the work-for-hire doctrine as U.S. copyright law does, and thus limit the rights of commissioning parties to those specified in the contract of hire; all other rights belong to the author.[2] This is an important copyright issue for audiovisual works, which typically involve scores of individuals working on a production without clear legal delineation as to the identity of the author and the identity of the copyright owner.

Moreover, with respect to cinematographic works, the final product, as well as the underlying work such as the book or screenplay on which the movie is produced, also are copyrightable, adding still another layer of complexity. In many countries of the EC, producers may have to enter into separate agreements with those who hold a potential stake in the copyrights, such as the director and screenwriter, to obtain a waiver of those rights.[3]

Another copyright principle found in civil law countries, not prevalent in common law countries, is "moral rights" protection. This includes the right of the author to object to any distortion, mutilation, or other modification of his work which would be prejudicial to his honor or reputation.[4] With regard to the moral rights issue, the EC Commission[5] has recognized the variations in the laws of the EC Member States,

2. With respect to cinematographic works, the countries that protect the author rather than the author's employer include Belgium, Denmark, Germany, France, and Italy. DR. ADOLF DIETZ, COPYRIGHT LAW IN THE EUROPEAN COMMUNITY 50-51 (1978). For example, while the Danish Copyright Law does not have specific provisions regarding the ownership of motion pictures, it can be inferred from several sections that only authors making creative contributions to a film are entitled to copyright protection. *Id.* at 52. In contrast, the producer of the film is granted the sole copyright in the United Kingdom, Ireland, and Luxembourg. *Id.* at 51.

3. An issue has arisen in the EC now as to whether certain rights, such as "moral rights," discussed *infra* note 4, can be waived at all.

4. Some form of "moral rights" legislation is in effect in the following Member States: Denmark, the Federal Republic of Germany, Italy, the Netherlands, France, Belgium, and Luxembourg, and possibly others. DIETZ, *supra* note 2, at 75. Under Irish and British law, there are sanctions for passing off an altered work as an unaltered work. *Id.* at 75-76.

5. The EC Commission is a law-making institution created in 1957 by the Treaty Establishing the European Economic Community (EEC Treaty) to draft proposals for EC legislation. If a directive is adopted by the EC Council, all Member States must implement the directive into their own legislation, even if they do not approve of a given directive. In July 1987, the Single European Act (SEA) became effective. 1 Traites, Instituant Les Communautes Europeennes 801, 1987 O.J. (L 169). One purpose of the SEA was to create a single European market by December 31, 1992. The SEA also extended the scope of Community competence into new areas (art. 3) and introduced several procedural changes to allow for more expedited decision making. For example, under the SEA, most legislation can be enacted by a qualified majority vote of the Council. Only certain measures, such as fiscal matters, now require a unanimous vote. *See, e.g.*, SEA arts. 100A and 57(2).

as well as among the members of the Berne Convention for the Protection of Literary and Artistic Works.[6]

Increasingly, the notion of moral rights has been invoked to protect cinematographic works from being altered in certain ways, such as through the colorization of black and white films and commercial breaks in films broadcast on television.[7] Some industries, such as broadcasting, newspapers, and magazine publishing, are time-sensitive. For these industries one contributor's objection to the adaptation of his or her work would be especially problematic.[8] In the motion picture business, an infusion of large sums of money, with attendant high risks, is required in many instances.[9] Thus, even where the relationship between the authors and the industry, or between the authors and the work, is already made public, and regulated by voluntary, arms-length contractual relationships, the invocation of moral rights can still generate restrictions on the use of works.[10]

The limitation of "fair use," the right of another to make certain uses of an author's work without her permission, is not recognized in civil law countries to the same degree it is in the United States, where the protection for such use is very broad. In contrast, many countries of the EC specifically set out uses by statute that do not require the author's permission.[11]

The laws of many EC countries also contain provisions regulating contracts for the exploitation of copyrighted works.[12] In the United States, this might be viewed as unnecessary government interference with contractual freedom. The EC view may reflect the fact that there are so many potential authors for a given audiovisual work. In contrast, in the United States the work-for-hire doctrine tends to concentrate the rights

6. *See* Working Programme of the Commission in the Field of Copyright and Neighbouring Rights, COM(90)584 final at 34 [hereinafter Follow-up Paper]; *see also* Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, *revised*, Paris, July 24, 1971, 25 U.S.T. 1341, 828 U.N.T.S. 221 [hereinafter Berne Convention]. Article 6*bis* of the Berne Convention lays down minimum rules on the scope and duration of moral rights, while leaving it to legislation in the country where protection is claimed to define the means of redress available to the author and other holders after his death. 828 U.N.T.S. at 235.

7. *See, e.g.*, Berne Convention, 828 U.N.T.S. at 235.

8. *In re* Comprehensive Study of Globalization of Mass Media Firms, Comments of the Committee for America's Copyright Community, to the National Telecommunications and Information Administration, *Notice of Inquiry* in MM Dkt. No. 900241-0041, at 14 (May 30, 1990) [hereinafter Comments of Committee].

9. *Id.*

10. *Id.*

11. *See* DIETZ, *supra* note 2, at 139-40.

12. *See generally id.* at 191-93. These regulations vary greatly among EC Member States. *Id.*

in the copyrighted work in a few parties, thus allowing for greater contractual freedom.

The EC Member States generally also protect neighboring rights, as recognized by the Rome Convention for the Protection of Performers, Producers of Phonograms, and Broadcasting Organizations.[13] The Rome Convention protects the rights of performers, broadcasting organizations, and producers of sound recordings beyond the scope of copyright law. The United States is not a member of the Rome Convention.

B. Implementation of the Berne Convention in the EC

With regard to other rights affecting audiovisual works in the EC, the Berne Convention remains the primary vehicle for protection. Almost all of the EC countries are members of the Berne Convention,[14] and negotiations are currently under way in several fora to strengthen international copyright protection.[15] The aim of the Berne Convention is to establish a minimum level of copyright protection that must be adopted into the national legislation of all member countries.[16]

13. Oct. 26, 1961, 496 U.N.T.S. 43 [hereinafter Rome Convention].

14. There is currently a proposal pending, submitted by the EC Commission in December 1990, for a Council Decision which would require all the Member States to accede to the Berne Convention (Paris Act) and the Rome Convention by December 31, 1992. *See* Amended Commission Proposal for a Council Decision Concerning the Accession of the Member States to the Berne Convention for the Protection of Literary and Artistic Works, as Revised by the Paris Act of 24 July 1971, and the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome Convention) of 26 October 1961, 1992 O.J. (C 57) 13. To date, only Belgium and Ireland are not parties to the Berne Convention, while fewer EC Member States are members of the Rome Convention.

15. Currently, talks involving the Trade Related Aspects of Intellectual Property (TRIPs) are being conducted by one of the multilateral working groups in the pending Uruguay Round of the General Agreement on Tariffs and Trade (GATT) negotiations. The TRIPs talks are being pursued in order to include a proposed intellectual property code within the GATT. In the Uruguay Round, the United States seeks a GATT model of rulemaking and dispute settlement, which will then be applied in the intellectual property area. *See* R. MICHAEL GADBAW & TIMOTHY J. RICHARDS, INTELLECTUAL PROPERTY RIGHTS: GLOBAL CONSENSUS, GLOBAL CONFLICT? 40 (1988). This model would include internationally recognized minimum standards for the protection of copyright and enforcement procedures. The EC wants to incorporate by reference the obligations of the Berne Convention and provide other rights, such as rental rights for cinematographic works. The U.S. text and the text issued by GATT Director Dunkel in Dec. 1991, on the other hand, would require contracting parties to provide authors and their successors in title with the economic rights provided in the Berne Convention, but would not include the moral rights provisions of the Berne Convention. Dunkel Draft Agreement on Trade Related Aspects of Intellectual Property Rights, GATT Doc., MTN.TNC/W/FA, Dec. 20, 1991, Annex III, art. 9.1, at 61. There are also negotiations under way within the World Intellectual Property Organization (WIPO) on the international harmonization of copyright laws, as well as an initiative to prepare an interpretive protocol to the Berne Convention.

16. M.M. BOGUSLAVSKY, COPYRIGHT IN INTERNATIONAL RELATIONS: INTERNATIONAL PROTECTION OF LITERARY AND SCIENTIFIC WORKS 88 (1979).

The Berne Convention provides that the enjoyment and exercise of copyright in the Berne member countries shall not depend on any special conditions or formalities, such as registration and copyright notice.[17] Thus, because nearly all EC Member States are members of the Berne Convention, it is not necessary that audiovisual or other copyrighted works be registered in order to be protected by copyright.

In terms of the Berne Convention's scope of protection, protected works generally fit into two groups. The first group includes books, pamphlets, dramatic and dramatico-musical works, choreographic and musical compositions with or without words, cinematographic works, painting, sculpture, and architectural works. These works form the majority of protected works and are unconditionally protected under the Berne Convention. The second group includes official texts of a legislative, administrative, and legal nature, and official translations of such texts, political speeches, and the like.[18] Protection for these works is determined by the domestic legislation of member countries.

Pursuant to the national treatment clause of Article 5, persons entitled to Convention protection[19] have, with respect to their works in all member countries, "the rights which their respective laws do grant or may hereafter grant to their nationals, as well as the rights specially granted by this Convention."[20] Thus, if the Berne Convention does not specify other rules, the laws of the country where protection is sought are applied.[21] The problem raised by this national treatment clause is that one member nation may not provide as high a degree of protection to its

17. Berne Convention, *supra* note 6, at art. 5(2). Implementation of the Berne Convention eliminated all formalities when the United States joined in 1988. Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988) (to be codified at 17 U.S.C. § 101 *et seq.* (1993).

18. BOGUSLAVSKY, *supra* note 16, at 93.

19. The persons entitled to corresponding rights under the Berne Convention include: (1) authors who are nationals of member countries, who have published their works for the first time in one of the member countries (according to the Paris text, in any country) and also nationals of member countries who are authors of an unpublished work; (2) persons without citizenship who reside in member countries; (3) authors who are nationals of countries not party to the Convention, but who usually reside in one of the member countries; and (4) authors who are nationals of countries not party to the Convention, but whose work was originally published in a member country or was published simultaneously in a member country and a non-member country. Berne Convention, *supra* note 6, at art. 3.

20. *Id.* at art. 5(1).

21. The country of origin is considered to be the Berne member country in which the work is first published, or in the case of works first published simultaneously in several countries of the Union that grant different terms of protection, the country whose legislation grants the shortest term of protection, or if the work is published simultaneously in a member country and a non-member country, the Berne member country. *Id.* at arts. 5(4)(a) and 5(4)(b). As regards cinematographic work, the country of origin is considered to be a country of the Union in which the maker resides or has his headquarters. *Id.* at art. 5(4)(c).

own nationals, and hence to the nationals of other member countries, as other members provide. Therefore, even under the Convention, protection between members will be uneven in scope.

From the foregoing, it is apparent that copyright laws may vary greatly among the EC Member States despite the minimum level of protection afforded by the Berne Convention. Until these national laws are harmonized, a copyright owner of an audiovisual work has no choice but to accept the varying levels of protection afforded by the Member States. However, the Berne Convention does provide some guidance, as outlined above, as to the minimum protection that can be expected.[22]

C. Harmonization of Copyright Laws in the EC

Article 2 of the EEC Treaty charges the EC Commission with the task of promoting the harmonious development of economic activities and closer relations between the Member States, in addition to establishing a common market and harmonizing the laws of the Member States. In 1991, the EC Commission put forth a Communication to the Council and Parliament regarding its proposed audiovisual policy for the Community, which indicated the need to establish a Community legal framework for copyright protection for such works.[23] In the AV Communication, the Commission warned that if a Community-wide approach were not adopted, the lack of legal certainty arising from the differences in the various national laws would "constitute a disincentive to investment in creativity, limit opportunities for the exploitation of creative works . . . and prove detrimental or advantageous depending on the nature of the legal system applied, to certain of the interested parties."[24]

Thus far, the Community's harmonization efforts have been piecemeal, recognizing that harmonization is not necessary for every aspect of copyright law. These efforts began with the EC Commission's Green Paper on Copyright and the Challenge of Technology—Copyright Issues Requiring Immediate Action.[25] Much of the Green Paper is devoted to issues involving protection of audiovisual works. Substantial chapters are devoted to issues of combating piracy of copyrighted works, home copying of audiovisual works, and Community-wide rental rights.[26] On January 17, 1991, the EC Commission released the Follow-up Paper to

22. For a detailed comparative discussion of the copyright laws of the various EC countries, including a discussion of special problems related to the protection of cinematographic works, see DIETZ, *supra* note 2.

23. Communication from the Commission to the Council and Parliament on Audiovisual Policy, COM(90)78 final at 4 [hereinafter AV Communication].

24. *Id.* at 17.

25. COM(88)172 final [hereinafter Green Paper].

26. *See id.* chs. 2, 3, and 4, respectively.

the Green Paper,[27] which defined a general policy program outlining the steps the Commission would take with respect to copyright and neighboring rights based on the earlier Green Paper and the reactions it elicited. The Follow-up Paper covers the period up to December 31, 1992.

The Community's overall intellectual property protection goal is to pursue adequate protection while harmonizing legislation so as to remove any trade restrictions between Member States. The Follow-up Paper stated that the Commission would seek to strengthen copyright protection and neighboring rights through a comprehensive approach.[28] The Commission recognized that the rule of national treatment laid down in the international copyright conventions means that any improved protection available in the Member States of the Community will have to be granted to natural or legal persons from non-convention-member countries, even if those countries provide a lower level of protection to natural or legal persons from the Community.[29]

One of the most important areas of concern to the Community involves distribution, exhaustion, and rental rights. In this regard, the Commission noted that a directive for the harmonization of rental and lending rights has been prepared.[30] This proposed Directive[31] would oblige Member States to grant to authors, performing artists, and producers an exclusive right to authorize or prohibit the commercial rental or lending of originals and copies of protected copyright works, phonograms, and videograms.[32] One aspect of copyright law which has been seen as a particular obstacle in the Community, due to the legislative disparities among the Member States, is the duration of copyright protection.[33] The Rental Rights Proposal provides that until further harmonization, these rights would last for a minimum term of fifty years after the death of the author, as provided in the Berne Convention (twenty years under Rome Convention for neighboring rights).[34] However Member States can adopt, for cultural purposes, an exception to the duration re-

27. *See* Follow-up Paper, *supra* note 6.

28. *Id.* at 2.

29. *Id.* at 4. This, of course, will be of much less concern if the proposal for a directive requiring Member States to accede to the Berne and Rome Conventions is adopted by the Council. *See* Proposal for a Council Directive to Accede to the Berne Convention and the Rome Convention by December 31, 1992, COM(90)582 final at C24, *amended*, COM(92)10 final at C57. This proposal is currently before the Council for adoption.

30. Follow-up Paper, *supra* note 6, at 15.

31. Proposal for a Council Directive on Rental Right, Lending Right, and on Certain Rights Related to Copyright, 1991 O.J. (C53) 35, *amended*, 1992 O.J. (C 128) 20.05.1992 [hereinafter Rental Rights Proposal]. On June 18, 1992, the Council adopted a common position, which is now before the Parliament for a second reading (unpublished).

32. *Id.* at 37, art. 3.

33. Follow-up Paper, *supra* note 6, at 34.

34. Rental Rights Proposal, *supra* note 31, at arts. 9 and 10, respectively.

quirement for works in public libraries and other specific uses.[35] Member States would also be required to introduce a right that would entitle performing artists to authorize or prohibit the fixation of their performances.[36]

With respect to the piracy of copyrighted works, the Commission indicated in the Follow-up Paper its intention to submit to the Council a binding legal instrument that requires all Member States to provide: (1) rights for producers of cinematographic works, videograms, and sound recordings to authorize the reproduction for commercial purposes of those works and their commercial distribution; (2) rights for performing artists to authorize the reproduction for commercial purposes of their fixed performances and their commercial distribution; (3) rights for organizations engaged in broadcasting to authorize the fixation and reproduction for commercial purposes of their broadcasts, as well as the commercial distribution of such fixed broadcasts, and the introduction of similar rights with respect to signals transmitted by cable in favor of cable television operations; and (4) introduction in all Member States of regimes making the possession of digital audio tape commercial duplicating equipment dependent upon a license to be delivered by a public authority and the maintenance of a register of such licensed equipment.[37]

A directive regarding piracy would also provide that the term of protection for all neighboring right holders should be harmonized and fixed to fifty years from production, performance, or publication.[38] The Commission noted that this proposal may be linked for practical purposes to the proposed directive on rental/lending rights.[39] The EC Commission has not yet submitted a proposal for this directive to the EC Council.

The Commission has submitted a proposal to harmonize the term of protection for copyright and neighboring rights.[40] At present, the term of protection varies among the Member States, hindering the free movement of copyrighted goods.[41] The proposal provides copyright protection for a term of seventy years after the death of the author and protection of neighboring rights for fifty years from the date of first publication or the fixation of the performance or first transmission of a

35. *Id.* at 36, art. 1.

36. *Id.* at 37, art. 7.

37. Follow-up Paper, *supra* note 6, at 7-8.

38. *Id.* at 9.

39. *Id.*

40. Proposal for a Council Directive Harmonizing the Term of Protection of Copyright and Certain Related Rights, COM(92)33 final. [hereinafter Term of Protection]. *See* Coopers & Lybrand, *Euroscope*, Intellectual Property, March 26, 1992.

41. Term of Protection, *supra* note 40.

broadcast.[42] The proposed directive would increase the level of protection available in most Member States, thereby encouraging creative works.[43]

The Commission has also stated that it would propose a directive on home copying of sound and audiovisual recordings.[44] Home copying is more prolific now due to new technologies. In addition, there are disparities in the relevant Member States' laws. Some Member States' laws protect these works by a system of remuneration, while others impose levies on blank tapes.[45] The Commission has indicated that it is favorably disposed toward the general use of the Serial Copy Management System (SCMS) for digital audio tape (DAT) recording equipment.[46]

In addition to the proposals mentioned in the Follow-Up Paper, on May 11, 1992, the Council adopted a proposal submitted by the EC Commission regarding works broadcast on television over satellite and retransmitted via cable,[47] as there are further copyright considerations that are particular to this medium. The proposal was needed because, as CBS, Inc. has noted, broadcasters and networks hold copyrights in much of their programming, including news and public affairs programming, many sports broadcasts, and a significant number of entertainment programs and made-for-television movies.[48] CBS has further noted that "the unauthorized resale or retransmission of these works infringes on these copyrights and deprives networks and broadcasters of potential income."[49] These works can be pirated through unauthorized interception of satellite transmissions, as the networks routinely use satellite transmissions to feed programming to affiliated stations and to purchasers of network-owned programming around the world.[50] In addition to the

42. *Id.* at 7.

43. *Id.*

44. Follow-up Paper, *supra* note 6, at 13.

45. *Id.*

46. *Id.* The SCMS system allows unlimited first-generation digital copying, but prohibits second-generation copying, so that rights holders keep at least partial control over the exploitation of their works. *Id.*

47. Council Directive, 1992 O.J. (L 137) 17 [hereinafter Satellite/Cable Directive]. *See also* Proposal for a Council Directive on the Coordination of Certain Rules Concerning Copyright and Negotiating Rights Applicable to Satellite Broadcasting and Cable Retransmission, 1991 O.J. (C 255) 3 [hereinafter Satellite/Cable Proposal]. This proposal was based on a previous discussion paper prepared by the EC Commission on copyright questions concerning cable and satellite broadcasts, entitled Broadcasting and Copyright in the Internal Market, 111/F/5263/90, November 1990.

48. Comments of CBS, Inc., *supra* note 8, at 27.

49. *Id.*

50. *Id.* CBS News, for example, delivers twice-daily satellite feeds world-wide of news programs tailored for foreign markets, and distributes the CBS Evening News daily by international satellite. *Id.* at 27-28. Broadcasters also receive satellite transmissions of foreign news and sports events, which they then retransmit to their viewers. *Id.*

interception of satellite transmissions, copyrighted programming is also being pirated from over-the-air transmissions.[51]

The aim of the Satellite/Cable Proposal is to create legal certainty in the Community, thereby facilitating the free movement of copyrighted works throughout the EC by means of satellite broadcasting or cable retransmission.[52] Currently, cross-border transmissions are inhibited by differences in national copyright laws related to broadcasting. Specifically, several measures are envisaged to facilitate satellite broadcasting: (1) any satellite broadcast originating in an EC Member State must be regarded as an act of broadcasting for copyright purposes, regardless of the technology used, once it constitutes communication to the public;[53] (2) a "broadcasting right" is created that allows the author to authorize or prohibit satellite broadcast of the copyrighted work;[54] (3) an adequate level of protection for authors' rights and the neighboring rights of performers, producers of phonograms, and broadcasters must be secured by a minimum level of harmonization of Member States' laws on the subject;[55] and (4) the right to broadcast protected works by satellite may only be acquired in the country of establishment of the broadcaster.[56]

The Commission's proposals with respect to simultaneous, unaltered, and unabridged cable retransmission of broadcasts can be summed up in four principles: (1) the cable retransmission of a program originating in another Member State is a form of exploitation subject to copyright, and therefore the cable operator must obtain authorization from the owners of all rights in any part of the program;[57] (2) these authorizations must be obtained by contractual means prior to broadcast;[58] (3) such rights can be managed on an exclusively collective basis as necessitated by the specific features of cable retransmission, and smooth operation of such collective agreements should not be blocked by opposition from the owners of individual rights in sections of the program to be

51. *Id.* at 28.

52. Coopers & Lybrand, *supra* note 40.

53. Satellite/Cable Directive, *supra* note 47, at art. 1. For copyright purposes it is no longer necessary to distinguish between direct broadcasting satellites and other satellites. *Id.* at art. 1(2).

54. *Id.* at art. 2. Member States would remain free to establish more restrictive rules protecting the author. *Id.* at art. 4(21).

55. *Id.* at art. 4(19). Thus, the interests of right holders will be safeguarded regardless of the broadcaster's Member State. The contract between the artist and the producer of an audiovisual work will contain the terms of remuneration of the artist. *Id.* at art. 4(21).

56. *Id.* at art. 3. The amount of payment for the broadcasting right should take into account the actual or potential number of viewers reached or reachable by a broadcast in the whole of the satellite "footprint."

57. *Id.* at art. 10.

58. *Id.*

retransmitted;[59] and (4) negotiations between cable operators and rights holders, who are represented by collective societies, should be eased by supplementary measures such as a voluntary conciliation mechanism and a mechanism designed to prevent the abuse of a party's negotiating position.[60]

As noted above, harmonization has not been proposed for all areas of copyright law affecting audiovisual works. For example, the EC Commission has not yet proposed any general harmonization of moral rights in the Member States, although it recognizes that in certain areas, such as the duration of moral rights, harmonizing legislation may have to be drafted.[61]

Awareness of the copyright laws in the various EC countries is not the end of the inquiry. Certain rights that stem from the initial copyright, such as reproduction[62] and performance rights,[63] may be lost or limited if attention is not paid to the country of first distribution. Thus, it is important to understand the various limitations that have been placed on these rights.

II
Limitations on Reproduction and Performance Rights

When the treaty establishing the EEC was executed, each Member State had already developed its intellectual property laws, and no provision of the treaty contemplated enacting Community legislation in this field. However, the EEC Treaty does have more general restrictions on laws that limit trade between Member States. Articles 30 and 34 prohibit Member States from creating national quantitative restrictions or measures of equivalent effect on the free movement of goods (or services under Article 59). Article 36 permits restrictions on grounds of industrial and commercial property, provided they do not constitute a means of arbitrary discrimination or a disguised restriction on trade between the Member States. The Court of the European Communities has inter-

59. *Id.* at art. 11.

60. *Id.* at arts. 13, 14, and 15.

61. Follow-up Paper, *supra* note 6, at 34-35.

62. The reproduction right gives the copyright holder the right to preclude "the physical copying of the work by any process which enables it to be communicated indirectly to the public." R. Joliet and P. Delsaux, *Copyright in the Case Law of the Court of Justice of the European Communities, in* Publication for l'Association litteraire et artistique internationale (ALAI) and the British Literary and Artistic Copyright Association (BLACA) 21 (1986).

63. Under the performance right, the copyright holder may preclude the direct communication of the work to the public. Actors may perform "before the public or by means of physical recordings of the work (the broadcasting of a record by radio or of a film by television or the public showing of a film)." *Id.*

preted Articles 30, 34, 36, and 59 in several copyright cases, thus deciding whether features of a Member State's copyright legislation were contrary to those provisions. Moreover, the European Community has also attempted to pass legislation that may be relevant in understanding how copyright is protected in the EC.

One of the most important aspects of Community law is the principle of Community exhaustion. This principle prevents the holder of parallel intellectual property rights in several Member States from combining the various rights to create a source of multiple benefits. For example, if a copyright holder markets his product or consents to the marketing of his product in a part of the Community with less copyright protection, he gives up the possibility of relying on the copyright for that product in another part of the Community where more favorable copyright protection is available. Community exhaustion has replaced national exhaustion, whereby the exclusivity from a copyright, for example, would extend only to the first marketing of the copyrighted product in the national territory.

The first aspect of Community exhaustion involves the interstate trade of recordings or copies (for example, videocassettes) made in the exercise of the right of reproduction. In *Musik-Vertrieb Membran v. GEMA*,[64] the scope of rights available with respect to imports of sound recordings manufactured and initially marketed in the United Kingdom and other countries, and then imported into Germany, was considered by the Court of Justice of the EC. In the U.K., the copyright legislation provides that after a musical work has been reproduced on a recording in the U.K. for the purpose of retail sale by the author, others could reproduce the work against a royalty to the copyright owner of 6.25% of the retail sale price of the recording. In most European countries, including Germany, the rate of those royalties was eight percent. GEMA, the German copyright management society, claimed that imports of recordings from the U.K. into Germany entitled it to payment of the difference between the U.K. and the German royalties. The Court held that national legislation authorizing such a claim would be contrary to the rules on free movement of goods, on the ground that the products had been marketed in the first Member State with the rightholder's consent. The Court noted that the author is free to choose the first Member State for distribution of his work, and he may make that choice in consideration of his best interests, including the level of remuneration provided in a particular Member State. From this decision, it is clear that the deter-

64. Judgment of the Court of Justice of 20 Jan. 1981, in Joined Cases 55 & 57/80, 1981 E.C.R. 147.

mination of where to first distribute the audiovisual product is extremely important.

Another limitation of Community law affects the copyright holder's right of performance. This limitation emerged in *Coditel v. Ciné-Vog Films*[65] in the context of public performance of films protected by copyright. The French owner of the proprietary rights in the film *Le Boucher* had given Ciné-Vog, a Belgian distribution company, the exclusive right to distribute the film in Belgium for seven years. When Germany's first television channel broadcast a German version of the film with the authorization of the copyright owner, the film was relayed to parts of Belgium by Coditel, a Belgian cable television diffusion company. Ciné-Vog brought an action against Coditel in a Belgian court. Under Belgian copyright law, Coditel needed the authorization of Ciné-Vog to relay the film over its network.

In *Coditel I*, the question arose as to whether Article 59[66] prohibited the assignee of the performing right in a cinematographic film in one Member State from relying upon that right in order to prevent a cable distributor from showing the film in that State without permission at the same time the film was legally broadcast by a third party in another Member State. The Court determined that the consent given by the rightholder to the German television company did not exhaust the assignee's copyright. It held that copyright entails the right to demand fees for *any* performance, and the rules of the treaty cannot in principle constitute an obstacle to the geographic limits that the parties to a contract of assignment have agreed upon in order to protect the author and the assignees.[67]

In *Coditel II*, the Belgian Court of Cassation referred to the Court of Justice the question regarding whether a contract granting exclusive performing rights to a film in a Member State for a certain period is prohibited by Article 85[68]—regarding competition law—because of its legal or economic circumstances. The Court determined that an exclusive license and an assignment are distinguishable, and stated that an assignment raises no problems under Article 85. With regard to an exclusive license

65. Judgment of the Court of Justice of 18 Mar. 1980, in Case 62/79, 1980 E.C.R. 881 (first judgment, by the Brussels Court of Appeals dealing with the issue of freedom to provide services) (*Coditel I*); and Judgment of the Court of Justice of 6 Oct. 1982, in Case 262/81, 1982 E.C.R. 3381 (second judgment, by the Court of Cassation regarding the issue of competition law) (*Coditel II*).

66. Specifically, Art. 59 of the EEC Treaty relates to the freedom to provide services.

67. *Coditel I & II*, *supra* note 65.

68. Art. 85 focuses on competition law, and specifically the extent to which companies are prohibited from entering arrangements that would inhibit free competition. This is similar to antitrust law.

covering a Member State, the Court found that Article 85 did not apply if it appeared that it would not have been possible to find a licensee for the territory in question without exclusive rights.[69]

In *Warner Bros. Inc. v. Christiansen*,[70] the EC Court of Justice held that the principle of Community exhaustion did not prevent the enforcement of a rental right concerning videocassettes under Danish law. Warner Brothers owned the copyright to the film *Never Say Never Again* under both U.K. and Danish law. Christiansen, the manager of a video shop in Copenhagen, bought a videocassette of that film in Britain and rented it in Copenhagen. Danish law grants the copyright holder of a work recorded on a videocassette the right to oppose the rental of videocassettes. The law in the U.K., in contrast, does not give the author any right to control rental, once the videocassette has been sold. When Warner Brothers brought an action against Christiansen, Christiansen invoked the principle of Community exhaustion. In rejecting this defense, the Court observed that the Danish law was not discriminatory, and that a rental right was justified by the importance of the rental market for videocassettes. Christiansen argued that once the copyright holder chose the initial market in which to put the product in circulation, he had to accept the consequence of this choice, including the free movement of goods between Member States. The Court rejected this argument, saying that such an interpretation would deprive the rental right available under Danish law of its substance.

Differences in the copyright laws of the various Member States can often be significant. As the *Warner Bros.* decision illustrates, the Community exhaustion principle will not always defeat the copyright owner's right to prevent infringing activities in Member States other than the one in which the program was first marketed. With the increase of transborder cable and satellite broadcast transmissions, the question of how best to protect copyright becomes more important. To some extent, there will be a minimum threshold of copyright protection in the EC because all of the Member States adhere to the Berne Convention. However, the Berne Convention provides only a minimum level of protection, and some states may grant greater protection, as seen, for example, in *Warner Bros.*

The recent EC proposals for Community Directives attempt to address some of the disparate copyright laws existing among the Member States and call for a harmonization of these laws. These measures would greatly decrease the uncertainties that currently exist. As the EC Commission stated in its Satellite/Cable Proposal, a Directive coordinating

69. *Id.*

70. Judgment of the Court of Justice of 17 May 1988, in Case 158/86, 1988 E.C.R. 2605.

the various national copyright rules would remove uncertainties surrounding the acquisition of rights for satellite broadcasting.[71] In the absence of coordination, satellite broadcasters, for example, might establish themselves in the Member State that provides the lowest level of protection for these related rights.[72]

Further, given the disparities between the laws of the Member States, the Court of Justice would likely continue to apply *Coditel v. Ciné-Vog*[73] and hold that there had not yet been established a single audiovisual area.[74] Thus, it is clear that without harmonization, copyright holders will still be vulnerable to the "exhaustion doctrine," and may lose copyright protection if the copyright holder does not diligently assess the levels of protection available in each Member State prior to the initial distribution or performance of the audiovisual work.

III
Conclusion

Copyright protection for audiovisual works in the EC has become increasingly problematic as the various Member States continue to apply inconsistent national legislation to protect the growing number of products that are produced and distributed across national borders. Further, because of the increased consumption of audiovisual works, a failure to harmonize particular aspects of the Member States' copyright laws will have an enormous negative economic impact within the Community. Finally, harmonization of the Members' copyright laws should contribute directly to the SEA's goal of achieving a unified market by the end of 1992.[75]

At this time, it appears that the Community has chosen wisely those areas of copyright law that need harmonization in order to achieve a single market, while resisting the temptation to harmonize those areas where a minimum level of protection is already provided under the Berne Convention.

In the areas requiring harmonization, most of the initiatives related to audiovisual works are well on track. Unfortunately, in the area of piracy of copyrighted works, the Commission has merely indicated its intention to submit a proposal. Piracy, particularly in transmissions of signals across national borders, has the greatest economic impact and is

71. Satellite/Cable Proposal, *supra* note 47, at 31.
72. *Id.*
73. *See Coditel I*, *supra* note 65, at 903.
74. Satellite/Cable Proposal, *supra* note 47, at 31.
75. *See supra* note 5.

least protected by other fora, such as the Berne Convention. Therefore, an effort should be made to expedite the process in this area.

In other copyright areas, such as rental rights and the terms of protection, the Commission has made significant headway in submitting proposals, although few have been adopted by the Council. The Council has issued Directives in other areas of copyright unrelated to audiovisual works, such as protection of computer software and databases. As these areas may be considered more important economically, the Commission appears to be taking a reasoned approach in setting priorities.

Apart from fulfilling the goals of the Community under the SEA, harmonization will alleviate the burdens now placed on rights holders and potential users of copyrighted works as a result of the application of the exhaustion doctrine. Holders of copyrights in audiovisual works will no longer be forced to forge distribution strategies requiring an understanding of diverse copyright laws in order to avoid exhausting more protective rights in one country by distributing in a country affording lesser rights. Users will benefit by knowing how they may use the works in question with greater certainty. Finally, as competition increases, consumers, too, should benefit by greater access to a broad variety of audiovisual works at lower rates and of better quality.